UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

SIX FLAGS MAGIC MOUNTAIN

Employer

and Case 31-UC-308

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 947

Union-Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER DISMISSING PETITION

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer, Six Flags Magic Mountain (the "Employer"), is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction.[1]

[1] The Employer, Six Flags Magic Mountain, a California corporation, is engaged in the operation of an amusement park at the Employer's principal place of business located at 26101 Magic Mountain Parkway, Valencia, California.

3. The International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 947 ("Union" or "Petitioner"), is a labor organization within the meaning of Section 2(5) of the Act, as amended.[2]

4. The parties are signatories to a collective bargaining agreement ("CBA") that is effective by its terms from January 1, 2003 through December 31, 2005. The Union proposes to clarify the current bargaining unit, as described in the CBA, to include within the maintenance and operations departments employees who are classified as "seasonal" by the Employer, and who perform the same type of work as employees currently within the classifications covered by the CBA ("disputed classifications").[3] The Employer contends that the unit clarification petition is untimely and unwarranted because: (1) it procedurally fails to comply with the Board's Rules and Regulations; (2) it attempts to effect a mid-term change to the parties express written agreements to exclude from the bargaining unit the "seasonal" employees here at issue; and (3) the disputed seasonal job classifications existed at the time the parties entered into the current CBA and the duties and responsibilities of the employees in such classifications have not substantially changed.

5. As detailed below, I find the petitioned-for clarification of the bargaining unit is both untimely and unwarranted, warranting the dismissal of the unit clarification petition.

Within the last twelve months, a representative period, the Employer in the course and conduct of its business operations has received gross revenues in excess of $500,000 at its Valencia, California facility, and within that same period, purchased goods valued in excess of $5,000 directly from suppliers located outside the State of California.

[2] Petitioner is an organization in which employees participate and which deals with the Employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, and working conditions.

[3] Petitioner states there are about 74 employees in the disputed classifications. The current bargaining unit consists of approximately 100 employees. Specifically, Petitioner is seeking to include employees classified as "seasonal" by the Employer in the following job classifications: Maintenance Helper I and II, Seamstress, Custodian, Water Treatment Technician, Coaster Crew, Show Technician, Auto Mechanic, Fiberglass Shop, Welder, Facilities Electrician, and Air Conditioning Technician.

I THE EMPLOYER'S OPERATIONS

The Employer operates an amusement theme park located in Valencia, California (the "Park"), that provides recreation and entertainment to customers. For the past five years, and continuing to date, the Employer has classified its employees as either "full-time employees" or "seasonal employees." A full-time employee is hired without considering the Park's seasonal demands, while a seasonal employee is one hired for a specific period of time depending on the operational and seasonal demands of the Park.

The number of hired seasonal employees varies depending on the time of year. From mid-April until late September/early October, the Park is open seven days a week; during this period the Employer employs between four and five thousand seasonal employees. For the rest of the year, when the Park is open only on weekends and holidays, approximately two thousand seasonal employees work.

The Employer hires full-time employees to work forty hours per week, while seasonal employees, although they may work forty hours per week, have no established hours and work on an as-needed basis. Some seasonal employees work forty hours a week for fifty-two weeks a year, while other seasonal employees work as little as eight to sixteen hours a week for only a few weeks a year. The Employer's policy is to tell newly-hired seasonal employees that their employment is on an as-needed basis, subject to the Park's operational demands.

II HISTORY OF LABOR RELATIONS BETWEEN THE PARTIES

A. Pre-Certification Negotiations

The parties' labor relations began on September 11, 2002, when the Union filed its first representation petition. The unit description in this petition neither included nor excluded seasonal employees. The Employer and the Union met several times to reach a stipulated election agreement, during which the Employer informed the Union that it employed seasonal employees. Arguing that they share the same community of interests,

the Union sought a unit that included both "seasonal" and "full-time" employees in the maintenance and operations departments; the Employer would not agree. The Employer proposed that the unit should not only exclude employees deemed to be "seasonal" under the Board's definition *but also* those employees the Employer classifies as "seasonal" because it applies different criteria from the Board's when determining whether an employee is "seasonal" or "full time."[4] The Employer also informed the Union that some employees it classified as "seasonal" worked 40 hours per week.

On October 7, 2002, the Union withdrew its first representation petition and on the same date filed a second representation petition, which also did not mention the term "seasonal" in the unit description. After further discussion with the Employer on the issue of "seasonal," the Union withdrew its second petition on October 25, 2002, and on that same date filed its third and final representation petition, 31-RC-8174. Adopting the unit description in the third representation petition, the parties entered into a stipulated election agreement which defined the appropriate collective bargaining unit as:

> INCLUDED: All regular full-time employees employed by the Employer in the Maintenance and Operations departments including the following: mechanical, electrical, vehicle maintenance, HVAC, cycle shop, welding, machine shop, shows/entertainment, wardrobe, buildings and grounds, carpentry, facilities, fiberglass/upholstery, plumbing, paint shop, sign shop, field paint, landscape, and water treatment at its facility at 26101 Magic Mountain Parkway, in Valencia, California.
>
> EXCLUDED: All seasonal employees, including all employees in the Operations Department classified by the Employer as seasonal employees, office clerical employees, guards, and supervisors as defined by the Act.

[4] Regular seasonal employees, under the Board's definition, are those who have a reasonable expectation of reemployment in the foreseeable future. *L & B Cooling,* 267 NLRB 1 (1983). According to the Employer, full-time employees are hired, inter alia, based on the experience they have in the work that they will be doing and are expected to have experience in the specific area in which the applicant is seeking employment. Those classified by the Employer as "seasonal" are hired into relatively low skilled positions where the Employer does not expect them to have experience in the area into which they are hired.

In addition to the stipulated election agreement, on October 25, 2002, the parties also entered into a stipulation/side agreement ("Side Agreement") that states:

> It is hereby stipulated by and between the parties that the term, "classified by the Employer as seasonal employee," as set forth in the unit exclusions does not in any way prejudice the Employer's position that the exclusion for 'seasonal employees' means those individuals classified by the Employer as seasonal employees. Nor does it prejudice the Union's position to the contrary.

On December 16, 2002, following a Board-conducted election, the Board certified the Union as the 9(a) representative of the unit as described in the stipulated election agreement.[5]

B. Post-Certification/Collective Bargaining Negotiations

The parties began negotiations for a collective bargaining agreement shortly after the issuance of the Certification of Representative. While negotiating the terms of the appropriate bargaining unit, both parties agree they spent more time discussing which classifications were to be included in the unit than which ones would be excluded. During these discussions a dispute arose as to how the Employer classified its employees as "seasonal."

The Union asserts it communicated to the Employer that it would consider anyone working 40 hours per week, 52 weeks per year to be deemed a full-time employee; that as to the concept of "seasonal" employees, the Union was using the Board's definition of a seasonal employee; and that the Employer told the Union that the dispute of what a "seasonal" employee is would best be resolved at a later date through a unit clarification proceeding.

[5] The Certification of Representative does not mention the Side Agreement. Shortly after entering into the October 25 stipulation, the Employer sent the Union an *Excelsior* list that did not include the names of those employees the Employer classified as seasonal. There is no evidence the Union objected.

The Employer states that in negotiating the terms of the appropriate exclusions in the bargaining unit, both parties agreed that they would use the definition of "seasonal" as used in the stipulated election agreement and Side Agreement — that is, both individuals defined as "seasonal" under the Board's definition *and* individuals the Employer classified as "seasonal." The Employer denies that it told the Union that they would leave it up to the Board at a later date to decide in a unit clarification proceeding which definition of "seasonal" controlled.

On June 23, 2003, the Union and the Employer executed the CBA, which was made retroactive by its terms from January 1, 2003 through December 31, 2005. The CBA's recognition clause contains a unit description identical to that found in the stipulated election agreement noted above and the Board's December 16, 2002 Certification of Representative.[6] On September 12, 2003, the Union informed the Employer about what it believed were misclassifications of the disputed classifications here at issue. On March 17, 2004, after negotiations to resolve this dispute failed, the Union filed the instant unit clarification petition.

III EMPLOYEES CLASSIFIED AS "SEASONAL" BY THE EMPLOYER WITHIN THE CLASSIFICATIONS COVERED BY THE COLLECTIVE BARGAINING AGREEMENT

Evidence establishes that the Employer maintains distinct job code designations for seasonal and full-time classifications and that the job classifications here in dispute have been coded as "seasonal" by the Employer since at least January 2002, which is well prior to the Union's first election petition. The seasonal job codes are distinct from the job codes identifying full-time employees, including those full time employees within the classifications in the certified bargaining unit.

[6] The Recognition clause, which makes no mention of the Side Agreement, states: "The appropriate Bargaining Unit shall include employees as certified in NLRB Case 31-RC-8174 …."

The Employer has had employees it classified as "seasonal" in the shops covering each of the disputed classifications for a substantial period of time prior to the parties reaching the October 25, 2002 stipulated election agreement and the June 23, 2003 CBA. Further, the record establishes that prior to reaching the stipulated election agreement and entering into the CBA, the Union was aware that there were employees classified as "seasonal" by the Employer who may have been performing the same type of work as employees within the covered classifications, and who were working 40 hours per week for 52 weeks of the year.

Finally, the evidence established that the duties and responsibilities of the disputed classifications – those classified as "seasonal" by the Employer in the maintenance and operations departments – have not changed since the parties reached the stipulated election agreement and the CBA. There is no evidence that the Employer has established any new job classifications since the onset of the parties' bargaining relationship.

IV. DISCUSSION, ANALYSIS, AND CONCLUSIONS

A. Employer's Motion to Dismiss

As a preliminary matter, the Employer filed a Motion to Dismiss the instant unit clarification petition, arguing that it fails to comply with Sections 102.61(d)(5) and (9) of the Board's Rules and Regulations and Section 11491.1 of the Board's Case Handling Manual by failing to contain, inter alia, a description of the proposed clarification and a statement setting forth the reasons for the desired clarification.

Although I agree that the initial Petition suffered from the omissions noted, I nevertheless deny the Motion. Sections 11014 and 11204 of the Board's Case Handling Manual permit the petitioning party during the course of the hearing to effectuate oral amendments of the petition so that the unit description conforms to that eventually being sought. See *Atlantic Richfield, Co.*, 208 NLRB 142 fn. 1 (1974). During the hearing, the Union stated numerous times and in several different ways that it was seeking to clarify

the unit to include the disputed classifications noted herein. As such, the record reflects a *de facto* amendment by the Union to conform its original petition to the unit eventually being sought.

Upon the entire record in this case, and taking into account the Employer's opportunity to respond to evidence adduced at the hearing as well as closing arguments made by both parties, the Hearing Officer's instructions, and the briefs filed by both parties, I conclude, and so find, that the Employer has not been prejudiced or denied due process by the noted omissions on the Petition. Therefore, I deny the Employer's Motion that the instant Petition be dismissed.

B. Applicable Case Law

Board law is clear with regard to the proper invocation of the unit clarification process. As stated in *Union Electric Co*., 217 NLRB 666, 667 (1975):

> Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category – excluded or included – that they occupied in the past. Clarification is *not* appropriate, however, for upsetting *an agreement of a union and employer* or an established practice of such parties concerning the unit placement of various individuals, *even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons* or the practice has become established by acquiescence and not express consent. (Emphasis added).

The Board is hesitant to clarify bargaining units during the term of a collective bargaining agreement that clearly defines the bargaining unit. *Wallace-Murray Corp*., 192 NLRB 1090 (1971). As the Board stated in *Edison Sault Elec. Co*., 313 NLRB 753 (1994):

> The Board's rule is based on the rationale that to entertain a petition for unit clarification during the midterm of a contract which clearly defines the bargaining unit would disrupt the parties' collective-bargaining relationship. In other words, the Board has held that to permit clarification during the course of a contract would mean that one of the parties would be able to effect a change in the composition of the bargaining unit during the contract term after it agreed to the unit's definition.

C. The Petition is not Timely

Here, both parties agree that none of the disputed classifications is new and that none of the disputed classifications has undergone recent, substantial change in duties or responsibilities since September 2002, when the parties began discussing bargaining unit composition.

Regarding the term "seasonal" as it is used in the CBA, I note that the parties engaged in substantial discussion on this subject prior to their execution of the CBA. In particular, I view the change from the unit description in the Union's first election petition, which was silent on the term "seasonal," to that which was finally agreed to in the third election petition, as particularly significant. The Side Agreement executed by the Parties on October 25, 2002, further supports my view that the Union understood – even though it did not agree – the Employer's definition and use of the term "seasonal." Since this usage was included in the CBA, I conclude that Union knew and understood the CBA unit language that it executed on June 23, 2003.

Here, as in *Wallace-Murray Corp*., supra, the unit placement of the disputed "seasonal" employee classifications was clear in the unit exclusions contained in the CBA. In these circumstances, to permit the Union to effect a change in the definition of the unit by means of a clarification procedure, would, in my judgment, be disruptive of an established bargaining relationship. See also *Arthur C. Logan Memorial Hospital*, 231 NLRB 778, 778 (1977); *Monongahela Power Co*., 198 NLRB 1183, 1183 (1972). Accordingly, as the instant clarification petition would upset the CBA concerning the placement of the

disputed classifications, I find the petition is untimely.[7] *Union Electric Co*., 217 NLRB 666 (1975).

D. The Petition is not Warranted

There is another independent basis for denying the requested clarification. Here, the disputed "seasonal" job classifications are not new since they were in existence at the time of the Board election and certification, and long before the parties executed the CBA. There is no evidence that any of the disputed job classifications have undergone recent substantial changes in their duties and responsibilities. In this circumstance, I find that the instant petition raises questions concerning the representation of the employees in the disputed classifications which, under settled precedent, cannot be resolved in a clarification proceeding. See *Monongahela Power Co*., 198 NLRB 1183, 1183 (1972); *Copperweld Specialty*, 204 NLRB 46, 46 (1973); *The Washington Post*, 256 NLRB 1243, 1245 (1981). Thus, even if the disputed job classifications were excluded from the bargaining unit because the Union mistakenly believed that the parties were operating under the Board's definition of "seasonal," "... [w]hether their exclusion was based on mistake or acquiescence, rather than express consent by [the Union], is immaterial for purposes of deciding whether clarification is appropriate." *The Washington Post*, supra, fn. 11. See also *Copperweld Specialty*, supra.

[7] In reaching this conclusion, I considered applicable exceptions to the holding in *Wallace-Murray*, such as that established in *St. Francis Hospital, Inc.*, 282 NLRB 950 (1987). In *St. Francis Hospital*, where a unit clarification petition was filed mid-way during the term of a contract that clearly defined the bargaining unit, the Board held that it would entertain such petition if petitioner reserved its right to file "shortly after" the contract was executed, absent an indication that petitioner abandoned its request in exchange for some concession in negotiations. In *The Baltimore Sun Co*., 296 NLRB 1023 (1989), the Board held that a unit clarification petition filed 11 weeks after execution of a collective bargaining agreement fell within the "shortly after" limitation set forth in *St. Francis Hospital*. Here, because the instant unit clarification petition was filed on March 17, 2004, almost nine months after the June 23, 2003 execution of the CBA, I find that the instant unit clarification petition was not filed "shortly after" the CBA's execution. As such, I find it unnecessary to decide whether the Union "reserved" its right to file the instant petition during bargaining negotiations.

The proper procedure for accomplishing the Union's purpose in the instant matter is a petition filed pursuant to section 9(c) of the Act, seeking election, rather than a petition for unit clarification.

Accordingly, clarification of the bargaining unit is not warranted.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and hereby is, DISMISSED.

RIGHT TO REQUEST REVIEW

Under the provisions of § 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by October 12, 2004.[8]

DATED at Los Angeles, California this 28th day of September, 2004.

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[8] See http://gpea.NLRB.gov for e-filing requirements.